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UNCLAS THE HAGUE 003294

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DEPARTMENT FOR L - TAFT/BETTAUER, L/UNA - BUCHWALD/MATTNER

E.O. 12958: N/A

TAGS: [AFIN](#) [AORC](#) [ICJ](#)

SUBJECT: ICJ: COURT DISMISSES NATO BOMBING CASE

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¶1. (SBU) Summary. The International Court of Justice (ICJ) on December 15 dismissed Serbia and Montenegro's (SAM) claims against NATO over the legality of 1999's Operation Allied Force. The unanimous judgment was based on jurisdictional grounds, but seven of the fifteen judges issued a joint declaration objecting to its broad reasoning. One concern of the seven, including U.S. Judge Buergenthal, is that the decision leaves open whether the SAM was party to the Genocide Convention between 1992 and 2000, throwing the genocide cases brought by Bosnia and Croatia into some doubt.
End summary.

¶2. (SBU) Background: The claim against NATO, filed by the FRY in 1999 and continued in 2003 by SAM, alleged that NATO's Kosovo-inspired military operation in the FRY breached international law on a number of counts, including the rules governing the use of force, the use of prohibited weapons, and the protection of civilians from the hazards of war. The claim based the court's jurisdiction on the Genocide Convention and named as respondents Belgium, Canada, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom, and the United States. The claims against Spain and the United States were dismissed for lack of jurisdiction in ¶1999. End background.

¶3. (SBU) The judgment focuses on two provisions of the ICJ Statute, paragraphs 1 and 2 of Article 35. The first paragraph grants a state access to the court if the state is a party to the Statute) that is, a UN member state. After discussion of the "amorphous state of affairs in which the Federal Republic of Yugoslavia found itself" between 1992 and 2000, the Court avoided a determination of whether it was a member of the UN during this period by focusing on FRY's admission to the UN on November 1, 2000) after its case against NATO had been filed in 1999. The Court found that the FRY was not a party to the ICJ Statute when the case was filed and that, therefore, it lacked jurisdiction under Article 35(1) of its statute. Article 35(2) of the Statute provides that a state not party to the ICJ Statute can gain access to the court through a treaty in force, which the court ruled to mean a treaty in force at the time the Statute entered into force on October 24, 1945. The Court found that no such treaty was in force, providing an interpretation that allowed the court to defer the issue of whether the FRY was a party to the Genocide Convention between 1992 and 2000 -- a treaty which entered into force on January 12, 1951, well after the ICJ Statute did.

¶4. (SBU) A joint declaration by Judges Ranjeva, Guillaume, Higgins, Kooijmans, Al-Khawasneh, Buergenthal, and Elaraby "profoundly disagree(s) with the reasoning upon which the Judgment rests," arguing that the Court's reliance on Article 35 is inconsistent with its past case law, fails to "choose the ground which is most secure in law and to avoid a ground which is less safe and, indeed, perhaps doubtful," and risks potentially negative implications for other pending cases. It is this last point that is most relevant to the genocide cases brought against the FRY. In particular, the declaration raises the judges' concern that this decision will materially affect Bosnia-Hercegovina's case against SAM for the application of the Genocide Convention, noting that "this approach appears to leave some doubt as to whether Yugoslavia was a party, between 1992 and 2000, to the United Nations Genocide Convention."

¶5. (SBU) Comment: While the outcome was no great surprise, those NATO member states party to this case certainly are relieved that it is now off the Court's docket. What was rather more unexpected was the way in which the Court addressed its jurisdiction, seemingly rejecting a series of principles derived not only from earlier cases but from earlier phases of this very case. The immediate question is how this decision will affect the Genocide Case brought by Bosnia, which is scheduled for a hearing on the merits in February 2006. At any rate, however, the Bosnia Genocide case remains alive and a point of contention between Belgrade and Sarajevo; unless it is settled, it could remain so even beyond 2006. End comment.

SOBEL